CASE NO. 21-1868

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN R., MINOR, by NEXT FRIEND, SARAH DIXON, *ET AL.*,

Plaintiffs-Appellants,

v.

JIM JUSTICE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF WEST VIRGINIA, *ET AL.*,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of West Virginia
Case No. 3:19-cv-00710

BRIEF OF *AMICI CURIAE* CHILD AND DISABILITY NON-GOVERNMENTAL ORGANIZATIONS

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IDENTITIES AND INTEREST OF *AMICI CURIAE* AND INDICATION THAT THIS BRIEF IS FILED WITH THE CONSENT OF THE PARTIES

CHILD USA is a leading national non-profit think tank working to end abuse and neglect in the United States. CHILD USA engages in high-level legal, social science, and medical research and analysis to derive the best public policies to end child abuse and neglect. Distinct from an organization engaged in the direct delivery of services, CHILD USA develops evidence-based solutions and information needed by policymakers, courts, and the public.

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies. The P&As and CAPs were established by Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education.

In the interest of full disclosures, Disability Rights of West Virginia—the employer of one of Appellants' attorneys in this matter—is one of fifty-seven constituent members of NDRN. All members of NDRN pay an annual membership fee based on a formula of the federal appropriations member agencies receives. All members receiving the same amount of appropriations pay the same fee and the formula has not changed in forty years. No membership or other fees were earmarked to support preparation of this amicus brief.

The National Health Law Program (NHeLP) is a 50-year-old public interest law organization that engages in education, litigation, and policy analysis to advance access to quality health care and protect the legal rights of low-income and underserved people, including children in the foster care system and with disabilities. NHeLP focuses on ensuring access and coverage for Medicaid beneficiaries and has represented thousands of low-income children and youth in institutional reform litigation across the United States.

The North American Council on Adoptable Children (NACAC), founded in 1975, is nonprofit organization working in the US and Canada to ensure that every child in foster care has a permanent, loving family. NACAC highlights and advocates for child welfare best practices to ensure children have a supported family; supports adoptive, foster, kinship families; educates parents and professionals; and develops youth and parent leaders.

Amici Curiae submit this brief with the consent of the parties to this matter. This brief was prepared wholly by undersigned counsel on a *pro bono* basis with assistance by in-house attorneys and/or staff for each of the *Amici Curiae* organizations and no party's counsel authored this brief in whole or in part. No costs for the preparation of this brief have been specifically contributed by any party.

ARGUMENT

Every child in foster care must have a case plan that provides "safe and proper care" and is calculated to "address the needs of the child while in foster care, including a discussion of the appropriateness of the services." 42 U.S.C. § 675(1)(b). A state must also have a case review system in place that is, among other requirements, "designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child." *Id.* § 675(5)(A).

As advocacy organizations focused on protecting children's welfare, *Amici Curiae* speak on behalf of children in West Virginia who will be irreparably harmed if the Court upholds the position that the federal judiciary ensuring institutional reform has no place in bettering West Virginia's broken foster care system. Further, *Amici Curiae* believe that the district court's misapplication of the *Younger v. Harris* abstention doctrine—if upheld—threatens the availability of litigation like this in all states which are subject to the jurisdiction of the Fourth Circuit.

Amici Curiae support Appellants as they seek to overturn the district court's decision dismissing this case on *Younger* abstention and mootness grounds. As is noted throughout Appellants' brief, the district court's reliance on dated precedent

and misunderstandings about how foster care works in practice, necessarily allows West Virginia's government to continue in past conduct which has resulted in some of the worst foster care outcomes in the United States. Given the longstanding failure of West Virginia's executive branch to appropriately care for the State's children, reforming parts of the system through litigation like this is a necessary path forward.

Amici Curiae here write in support of Appellants to flesh out two issues: first, to discuss data related to West Virginia's foster care system and what the data means in practice for youth in care. Second, *Amici Curiae* seek to discuss how foster-care-targeted institutional reform cases have played out in other jurisdictions in terms of bettering outcomes for youth.

Amici Curiae here are all non-governmental organizations with extensive legal and practical experience in child health, abuse, and neglect issues and institutional reform of social welfare agencies. *Amici Curiae* are unanimous in their conviction that the district court's decision here is in error and should be overturned. Allowing this decision to stand potentially forecloses institutional reform litigation which is, in a sense, the last, best chance youth in care have to advocate for federal courts—disinterested parties—to evaluate how state officials behave in terms of various issues which are not specific to the cases of individual children. While the district court's decision is plainly harmful to the class of

individuals Appellants seek to represent in this case, this Court upholding it represents a potential concern for youth in every constituent state in the Fourth Circuit.

As a starting point, institutional reform litigation is fundamental to protecting the constitutional and statutory rights of children in in foster care. Like all states, West Virginia has a "special relationship" with children in the custody of its foster care agencies. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). When a state "so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *Id.* at 200 (internal citation omitted). In a custodial setting, the State assumes at least "some responsibility" for both an individual's "safety" and his "general well-being." *Id.* at 199-200. The State's responsibility to protect foster children's "general well-being" requires it "to take steps to prevent children in state institutions from deteriorating physically or psychologically." *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990); *see also M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 251 n.21 (5th Cir. 2018) (collecting cases for the proposition that the state must protect people in custodial care from both physical and psychological damage).

Removal of children from their home into state foster care trigger Fourteenth Amendment due process protections. *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012); *Tamas v. Dep't of Soc. & Health Servs.,* 630 F.3d 833, 846-47 (9th Cir. 2010). A foster child has a "protected liberty interest" in "reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992) (citations omitted). Children in foster care have an actionable claim under the Constitution when agency practices put them at an unreasonable risk of harm. *Henry A.*, 678 F.3d at 1000-01; *see also M.D. v. Perry*, 152 F. Supp. 3d 684, 696 (S.D. Tex. 2015) (collecting cases holding that a "foster child's right to be free from an unreasonable risk of harm 'encompasses a right to protection from psychological as well as physical abuse'"). Plaintiffs need not wait until they have suffered actual injury before asserting a constitutional claim seeking injunctive relief—a substantial risk of harm is sufficient to support the claims. *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014) (finding prisoners' claim for injunctive relief based on risk of future harm due to unsafe conditions was "firmly established in our constitutional law"); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1984) (plaintiffs "need not wait until actual casualties occur in order to obtain relief from [unsafe] conditions").

The district court's decision—clothed in neutral language of abstention and mootness—closes the door to the thousands of children committed to the custody of the State of West Virginia even though the State's foster care system is today the worst in the United States on various measures. And, all neutral principles aside, individual West Virginia circuit court judges lack the ability to drive the institutional changes required to address the issues raised in Appellants' complaint.

Younger v. Harris, 401 U.S. 37 (1971), a key precedent here, applies in situations where ongoing state judicial proceedings would be trumped by requested relief in a federal court. The lower court's decision is premised on West Virginia circuit court judges in individual cases being able to compel needed foster care reform. Simply stated, they cannot. Both precedent and the rules of practice in West Virginia child welfare cases prevent them from evaluating the sort of broad, systematic issues Appellants raised below. Federal courts have long worked in partnership with children in the custody of foster care agencies to remedy issues of systemic dysfunction that results in the deprivation of their civil rights as established by the U.S. Constitution and federal law.[1]

[1] *See, e.g.*, *L.H. v. Jamieson*, 643 F.2d 1351, 1352-54 (9th Cir. 1981); *M.D. v. Perry*, 799 F. Supp. 2d 712, 723 (S.D. Tex. 2011); *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941, 957 (M.D. Tenn. 2000).

Class action litigation has been long recognized by nearly every appellate court to review the issue as an avenue available to protect the interests of persons in state custody, including children. This decision should be overturned and this case remanded with the direction that it should proceed consistent with all other similar cases in recent years. (*See* Appellants' Brief at 16) (citing cases).

This brief is intended to address two sets of issues. *First*, West Virginia's foster care is broken in the sense that it is the worst in the U.S. on various measures including the percentage of youth in foster care; the treatment of individuals with disabilities; and the stress load of its caseworkers. Accordingly, kids in foster care suffer in predictable ways which could be addressed here. *Second*, crafting injunctive relief to remedy these issues is wholly within the power of federal courts as will be illustrated by results from other institutional reform cases.

A. West Virginia's Foster Care System Is Broken.

Amici Curiae acknowledge that West Virginia's foster care system—like those in many other states—is filled with well-meaning personnel who work in difficult conditions to act in what they perceive to be the best interests of the children in their care. Centralized planning by West Virginia executive branch officials—and not decisions in individual child-focused cases by West Virginia state trial courts—is the main method to remedy these issues. The district court's decision—which relegates system-focused challenges into state circuit court

proceedings specifically proscribed from hearing them—forecloses the ability to use the judicial process to remedy issues including the overuse of congregate care; the treatment of marginalized sub-groups; and caseworker staffing issues. These issues are discussed in turn.

1. West Virginia's Overuse of Congregate Care.

Kids do best living in family-like environments, and well-run foster care systems accordingly seek to place youth in family-like settings. Placing large numbers of children in institutional settings—referred to as "congregate care"—leads to negative health outcomes in both the short-term and longer term. Youth in institutions may experience a variety of negative stressors, including low caregiver investment, high child-to-caregiver ratios, and punitive and non-individualized care.[2] Studies show that institutional care creates adverse childhood experiences—or "ACEs"—which social science links to chronic physical and mental health problems in adulthood.[3] More specifically, congregate care settings expose

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[2] *See* Mary Dozier et al., *Institutional Care for Young Children: Review of Literature & Policy Implications*, 6 SOC. ISSUES & POL'Y REV. 1, 3 (2012).

[3] *See, e.g.*, Adverse Childhood Experiences and the Lifelong Consequences of Trauma, AM. ACAD. OF PEDIATRICS (2014), at 2, *available at* https://www.unitedforyouth.org/sites/default/files/2020-08/Adverse%20Childhood%20Experiences%20and%20the%20Lifelong%20Consequences%20of%20Trauma.pdf (last checked Nov. 10, 2021); Jennifer S. Middlebrooks & Natalie C. Audage, *The Effects of Childhood Stress on Health Across the Lifespan*, CTRS. FOR DISEASE CONTROL & PREVENTION (2007), at 5 (Continued . . .)

children to higher rates of physical and sexual violence and maltreatment when compared to more family-like settings.[4] Similarly, children warehoused in congregate care are more likely to be physically restrained or drugged.[5] Predictably, over the longer term, a single placement of a youth in institutional care increases the chances that they are arrested by 250%.[6]

(linking institutional care to chronic stress, resulting in a long-term risk of heart disease, diabetes, joint disease, depression, obesity, and premature death; chronic or toxic stress also affects brain development, altering emotional regulation, decision-making, and planning).

[4] Saskia Euser et al., *The Prevalence of Child Sexual Abuse in Out-of-Home Care: A Comparison Between Abuse in Residential and in Foster Care*, 18 CHILD MALTREATMENT 221, 221-31 (2013); Saskia Euser et al., *Out of Home Placement to Promote Safety? The Prevalence of Physical Abuse in Residential and Foster Care*, 37 CHILD. & YOUTH SERVS. REV. 64, 64-70 (2014).

[5] *See, e.g.*, Committee on Restraint & Crisis Intervention, *Behavior Support & Management: Coordinated Standards for Children's Systems of Care* (Sept. 2007), at 28-31, *available at* https://www.ccf.ny.gov/files/3713/7969/9441/RestraintReport.pdf (discussing physical restraints); Ramesh Raghavan, et al., *Psychotropic Medication Use in a National Probability Sample of Children in the Child Welfare System*,15(1) J. CHILD & ADOLESCENT PSYCHOPHARMACOLOGY 97, 99 (2005) (relying on the National Survey on Child and Adolescent Well-Being to compare use of psychotropic drugs in family-like versus institutional settings).

[6] Joseph P. Ryan et al., *Juvenile Delinquency in Child Welfare: Investigating Group Home Effects*, 30 CHILD. & YOUTH SERV. REV. 1088, 1088 (2008).

West Virginia leads the nation in terms of the proportion of its children in foster care who are housed in congregate care.[7] As is emphasized in the preceding paragraph, even a short period in congregate care creates trauma for a child.[8] West Virginia's rate of 20 per 1000 children (ages 0-17) in foster care was the highest amongst all states in 2019. The state's rate of children in foster care per capita is approximately three times the national average.[9]

How exactly are West Virginia circuit court judges making placement determinations supposed to remedy this issue? These judges are generally confronted with up-or-down choices as to whether placements proposed by caseworkers are acceptable or not. Binding precedent in West Virginia makes clear that kids' attorneys cannot raise "perceived systematic failures" in the course of litigating placement determinations. *See Lawyer Disciplinary Bd. v. Thompson*, 238 W. Va. 745, 757 (2017) (chastising an attorney representing an infant for

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[7] Sarah Catherine Williams, *State-level Data for Understanding Child Welfare in the United States*, CHILDTRENDS.ORG (Oct. 28, 2020), *available at* https://www.childtrends.org/publications/state-level-data-for-understanding-child-welfare-in-the-united-states.

[8] Think of Us, *Away from Home* (2021).

[9] West Virginia Department of Health & Human Resources, *West Virginia 2021 Annual Progress and Services Review* (2021), https://dhhr.wv.gov/bcf/Reports/Documents/West%20Virginia%20APSR%202021.pdf (last checked Nov. 10, 2021).

holding "the child's case hostage in a grossly misplaced attempt [at raising] the perceived failures of DHHR").

Over reliance on congregate care also violates the Americans with Disabilities Act's (ADA) integration mandate. The integration mandate, as clearly articulated by Congress and the United States Supreme Court, requires the state to offer all services to foster youth in the most integrated setting appropriate to meet their care needs. 28 C.F.R. § 35.130(d); *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999). In *M.R. v. Dreyfus*, 663 F.3d 1100, 1117 (9th Cir. 2011), *opinion amended and superseded on denial of reh'g*, 697 F.3d 706 (9th Cir. 2012), the "elimination of services" that tends to increase the risk of placement in an institutional or less integrated setting can likewise be challenged under the integration mandate.[10] Neither is the mere transfer of services received in an institutional setting to a community setting, without more, a fundamental alteration under the ADA. *Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003). Finally, the requirement to provide services in the most integrated setting extends to all provided services. *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1205 (D. Or. 2012).

[10] *Accord M.J. v. District of Columbia*, No. 1:18-cv-01901-EGS, 2019 WL 3344459, at *1 (D.D.C. July 25, 2019) (allegation that state "failed to provide required services in their homes, or in the community, they are unnecessarily institutionalized" stated an *Olmstead* claim).

2. The Foster Care System and Its Treatment of Marginalized Sub-groups.

Similarly, circuit court judges making placement decisions lack the ability to meaningfully address why marginalized subgroups like racial minorities and kids with disabilities have far worse outcomes in foster care. As background, marginalized sub-groups like these are generally over-represented in the foster care system.[11] And, once in the system, racial minority youth in care tend to be housed in institutional settings at a far higher rate than white children.[12] They also are far more likely to be institutionalized and fail to achieve permanency than white children.[13] Individual child welfare proceedings give youth no avenue to evaluate complicated issues like race in care. Indeed, the West Virginia trial court system is structurally unable to evaluate any disproportionate racial impact given that the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings

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[11] *See* Children's Defense Fund, *The State of American Children* (2021) (stating that Black children are represented in foster care at a rate that is 1.66 times their portion of the overall population and in 18 states at a rate that is more than double).

[12] *See, e.g.*, X. Zhou et al., *Using Congregate Care: What the Evidence Tells Us*, Ctr. for State Child Welfare Data, Chapin Hall at the Univ. of Chi. (2021), *available at* https://assets.aecf.org/m/resourcedoc/chapinhall-usingcongregatecare-2021.pdf.

[13] Alan J. Dettlaff et al., *It Is Not a Broken System, It Is a System that Needs to Be Broken: the upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 502 (2020).

("W.V. R.C.A.N.P.") require that all cases be resolved without delay. *See id.* R.5. There is no way a West Virginia circuit court judge could possibly review broad issues of disproportionate impact without delaying individual-specific determinations particular to the singular cases before them.

Outcomes for foster children with disabilities are similarly significantly worse than for the general population. West Virginia's foster care system contains a significant percentage of youth with disabilities. Approximately 30% of West Virginia youth have one or more emotional, developmental, or behavioral disabilities—the highest proportion of any state.[14] Twenty-seven percent of youth placed in out-of-state residential or specialized foster care settings had an intellectual disability.[15] In early 2021, 402 West Virginia foster kids were living out of state. Of these placements, more than a quarter were identified as having an intellectual disability.[16] During this period, the state held contracts with 49 out-of-state treatment centers, in states as far away as Utah, Arkansas, and Florida.

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[14] Annie E. Casey Foundation, Kids Count Data Center (2021), https://datacenter.kidscount.org/ (last checked Nov. 10, 2021).

[15] West Virginia Department of Health & Human Resources, Commission to Study Residential Placement of Children, *Advancing New Outcomes: Findings, Recommendations, and Actions* (Feb. 2021), https://www.wvdhhr.org/oos_comm/reports/2020AdvancingNewOutcomesAnnualReport.pdf (last checked Nov. 10, 2021).

[16] *Id.*

DHHR case review data shows that meeting child mental and behavioral health needs was rated as a strength in only 60.7% of cases in fiscal year 2018.[17] The same structural issues that prevent circuit court judges from addressing why kids who are racial minorities have worse outcomes in foster care also prevent state court judges from meaningfully investigating issues that affect kids with disabilities.[18]

3. Caseworker Staffing and Follow-up.

Finally, West Virginia has significant problems with caseworker training and retention that are both outside the competence of a state trial court as well as impossible to remedy without centralized planning. Logically, appropriate placement recommendations lead to better placement decisions. Permanency planning suffers when case workers, care providers, and kids in care fail to communicate.[19] A qualitative study of foster care providers and workers found

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[17] West Virginia Department of Health & Human Resources, *supra* note 9, at 80.

[18] This data would be mirrored in the case of other marginalized sub-groups, perhaps most notably LGBTQ+ youth, who generally comprise more than a quarter of the foster care population and are more likely to be housed in congregate care. *See generally* Children's Rights et al., *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* (2017) at 3, *available at* tgnc-policy-report_2017_final-web_05-02-17.pdf (lambdalegal.org).

[19] Madelyn Freundlich & Rosemary J. Avery, *Planning for Permanency for Youth in Congregate Care*, 27 CHILD. & YOUTH SERV. REV. 115, 130 (2005).

that "[i]nsufficient staff resources, pressure on services, and high administrative workload demands" led to social workers missing appointments and spending less one-on-one time developing rapport with kids in care.[20] This resource constraint prevented a deep understanding of children's needs and contributed to disrupted placements. Staff turnover reduces consistency and critical contextual knowledge of a child's behavior during crisis.[21] Social workers who have appropriate caseloads can spend more time with children in care, leading to higher levels of permanency.[22]

This plainly is not happening right now in West Virginia. The West Virginia Foster Care Ombudsman received 312 complaints during the first year the position existed.[23] Thirteen and a half percent of these complaints were related to lack of communication. Youth in care perceive trust and continuity in

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[20] Sara McLean, *Barriers to Collaboration on Behalf of Children with Challenging Behaviours: A Large Qualitative Study of Five Constituent Groups*, 17 CHILD FAM. SOC. WORK 478, 484 (2012).

[21] *Id.*

[22] *See generally* Ruth M. Chambers et al., *"It's Just Not Right to Move a Kid That Many Times:" A Qualitative Study of How Foster Care Alumni Perceive Placement Moves*, 86 CHILD. YOUTH SERV. REV. 76 (2018).

[23] West Virginia Department of Health & Human Resources, *WV Foster Care Ombudsman Program, The First Year in Review* at 15, https://www.wvdhhr.org/oig/pdf/FCO/First%20Report%20of%20the%20Foster%20Care%20Ombudsman.pdf (last checked Nov. 12, 2021).

relationships—both of which require communication—to be two major factors dictating the quality of their interactions with caseworkers.[24] Poor communication among youth, case workers, and foster care workers leads to systematically worse outcomes for youth in care. Poor inputs lead to poor outcomes.

B. Institutional Reform Litigation Routinely Results in Benefits to Children in Custodial Care.

The preceding section of this brief touches briefly on why West Virginia circuit court judges cannot address particular issues. In contrast, institutional reform litigation in the foster care sphere is common, beneficial, and has the potential for causing systematic reform in a way that the case-by-case approach sanctioned in the court below cannot be reasonably expected to do. Since the 1980s, over seventy class action lawsuits in thirty-two states have been filed by child welfare advocates to leverage court authority to force state child welfare agency leaders to implement systemic institutional reforms to improve agency functioning, program and service provision, and case practice standards for youth in foster care.[25]

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[24] Astraea Augsberger & Emilie Swenson, *"My Worker Was There When It Really Mattered:" Foster Care Youths' Perceptions and Experiences of Their Relationships with Child Welfare Workers*, 96 FAM. SOC. 234 (2015).

[25] *See* Ariel Alvarez, *LGBTQ Youth in Foster Care: Litigated Reform of New Jersey's Child Welfare System*, 14 J. PUB. CHILD WELFARE 231 (2020).

Data shows that class action child welfare litigation routinely improves systems. It can be useful in reducing social worker caseloads and increasing the quality of worker training in many jurisdictions.[26] Notably here, institutional reform cases have succeeded in significantly increasing the placement of children in family settings in contrast to group homes or other congregate settings.[27] Child welfare class actions can cause foster care systems to move toward permanency more rapidly either through reunifying biological families, through encouraging adoption, or placement in appropriate homes.[28] Two examples—one from Tennessee and the other from New Jersey—illustrate this point:

1. Tennessee Foster Care Litigation.

In an eight-year period following its filing, the *Brian A. v. Sundquist* class action lawsuit resulted in a significant decline in congregate care utilization. Direct entry into congregate settings declined from 28% to 12% from 2000 to 2008. The proportion of foster youth in congregate settings at a given point in time

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[26] *See* Child Welfare League of America, *Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005*, at 7 (2005) *available at* https://thehill.com/sites/default/files/consentdecrees_0.pdf (last checked Nov. 10, 2021) [hereinafter Child Welfare Consent Decrees]; Julie Farber & Sarah Munson, *Strengthening the Child Welfare Workforce: Lessons from Litigation*, 4:2 J. PUB. CHILD WELFARE 132, 132-57 (2010).

[27] Child Welfare Consent Decrees at 20.

[28] *Id.* at 18-20.

declined from 22% to 9% from 2001 to 2009.[29] One notable reform involved creating a "Continuum" system to provide financial incentives to place children in appropriate, least restrictive settings. In 2009, the state had placed 95% of "moderately disturbed" and 75% of "severely disturbed" children in family settings.[30]

2. New Jersey Foster Care Litigation.

A New Jersey foster care institutional reform case shows similar successes in reducing problems associated with congregate care. This case, styled *Charlie and Nadine H. v. Greevey*, was the catalyst for a measurable decrease in use of inappropriate placements for children.[31] For example, over a two-year period starting in 2007, the state reduced the population of foster youth in congregate care from 15% to 13%.[32] Children placed in out-of-state congregate care settings declined from 235 to 98 over the same period—a 52% reduction. New Jersey went

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[29] Lily T. Alpert & William Meezan, *Moving Away from Congregate Care: One State's Path to Reform and Lessons for the Field*, 34 CHILD. YOUTH SERV. REV. 1519 (2012).

[30] *Id.*

[31] National Center for Youth Law, Strategies, *Charlie and Nadine H. v. Corzine* (Nov 18, 2016), https://youthlaw.org/case/charlie-nadine-h-v-corzine/.

[32] Center for the Study of Social Policy, Progress of the New Jersey Department of Children and Families – Period V Monitoring Report for *Charlie and Nadine H. v. Corzine* (Apr. 27, 2009), https://www.childrensrights.org/wp-content/uploads//2009/04/2009-04-27_nj_monitoring_report_final_corrected.pdf.

on to reduce the proportion of youth in congregate care by from 12% to 7% from 2009 to 2016.[33] Other successes in this reform effort included increased supply of licensed foster families, more manageable caseloads for social workers, and increased adoptions.[18]

C. West Virginia's Foster Care System Is Already Shaped by Litigation.

Finally, the threat of litigation is clearly a driving factor in causing change in West Virginia, as is evidenced by the 2019 Agreement between the U.S. Department of Justice and the West Virginia Department of Health and Human Resources regarding alleged violations of the Americans with Disabilities Act. (J.A. 182-212.) The DOJ found that West Virginia was over-utilizing residential mental health treatment facilities and recommended increased community-based supports for children to prevent unnecessary institutionalization. (*See generally id.*) While implementation of the DOJ Agreement remains ongoing, it illustrates that litigation has a place in reforming West Virginia's broken foster care system and bettering the lives of kids in care.

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[33] Casey Family Programs, *How Did New Jersey Safely Reduce the Number of Children in Congregate Care?* (Sept. 25, 2018), https://www.casey.org/new-jersey-reduce-congregate-care/.

CONCLUSION

As is discussed above, the district court's decision fundamentally rests on an oversimplification as to how foster care systems operate. Institutional reform litigation like this case is needed in West Virginia. Accordingly, the Court should reverse the rulings of the District Court in their entirety and remand this matter for further proceedings.

Dated: November 15, 2021

Respectfully submitted,

/s/ J. Michael Showalter

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1868 *Jonathan R., et al. v. Jim Justice, et al.*

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Dated: November 15, 2021

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on November 15, 2021, he caused the foregoing document to be electronically filed through the Court's ECF system and that service of that document was accomplished through the aforementioned system on all counsel of record to this matter at the following addresses:

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/s/ J. Michael Showalter
J. Michael Showalter

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 21-1868 as

☐ Retained ☐ Court-appointed(CJA) ☐ CJA associate ☐ Court-assigned(non-CJA) ☐ Federal Defender

☑ Pro Bono ☐ Government

COUNSEL FOR: CHILD USA; The National Disability Rights Network (NDRN); North American Council on Adoptable Children; National Health Law Program as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

/s/ J. Michael Showalter
(signature)

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CERTIFICATE OF SERVICE *(required for parties served outside CM/ECF)*: I certify that this document was served on 11-15-21 by ☐ personal delivery; ☑ mail; ☐ third-party commercial carrier; or ☐ email (with written consent) on the following persons at the addresses or email addresses shown:

See attached.

/s/ J. Michael Showalter
Signature

11-15-2021
Date

1/28/2020 SCC